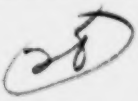

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 679

M. D. (DOC) BENNETT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

R. PALMER INGRAM,
Counsel for Petitioner.

W. LOUIS ELLIS, JR.,
R. CLARENCE DOZIER,
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The Daily Record Co. Print, Baltimore.

Citations.

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ARGUMENT.

The Argument advanced by the Government's Brief in opposition to the Petition for Writ of Certiorari is both *specious* and *fallacious*, for the following reasons:

(1) The Government admits,

"While it may be that the affiant, in testifying before the commissioner, gave in part hearsay evidence,

> *this infirmity* clearly *does not attach to the affidavit* (original) (ours), which, on its face, lends itself solely to the conclusion that the affiant had personal knowledge of the facts stated therein." (Government's Brief, pp. 13-14).

(2) The Government attempts to justify the *invalid search warrant*, as follows:

> "Since under the procedure prescribed by the statute, the judge or commissioner, before issuing a warrant, must examine the complainant on oath and require his affidavit or deposition in writing and cause it to be subscribed (Sec. 4 of the Espionage Act, p. 3, supra), and since it is the affidavit or deposition which must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist (Sec. 5, ibid., p. 3, supra), determination of the question is necessarily dependent upon the contents of the affidavit, and not upon what the affiant may have testified to before the judge or commissioner." (Government's Brief, p. 13).

This is a specious but fallacious interpretation of the intent and purpose of Sections 4 and 5 of the Espionage Act aforesaid, and it is not necessary for us to discuss the sufficiency or insufficiency of the (original) (ours) affidavit, *inasmuch as it was not incorporated in the search warrant*, in view of the mandatory provisions of Section 6 of the Espionage Act, as follows:

> "ISSUE AND CONTENTS OF WARRANT. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular

grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner." (Petition p. 5).

The search warrant in the instant case (R. 6-8) falls clearly and unquestionably within the class condemned in

Veeder v. United States (C. C. A.), 252 Fed. 414
Giles v. United States (C. C. A.), 284 Fed. 208
United States v. Casino, 286 Fed. 976
Poldo v. United States (C. C. A.), 55 Fed. (2d) 866

Most forcefully is presented the invalidity of the search warrant in Schencks v. United States (C. C. A., D. C.), 2 Fed. (2d) 185-187, where the Court said:

"A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. **If he has no first hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions.** In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the

judge or commissioner to give testimony as to the truth of the statement made by him to the officer.

"Peace officers, to their credit be it said, zealously endeavor as a rule to bring law-breakers to justice, but unfortunately they are easily satisfied as to the guilt of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they **had reason to believe** and **did believe** that the law had been broken, or because they deposed that they were **informed and believed** that certain facts existed, would leave the home, the property, and the person of the citizen at **the mercy of mere suspicion**, and of misstatements, and mis-information for which no one could be held accountable. * * *.

"The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, * * * which fail to establish probable cause, inasmuch as they state **the facts on information and belief or state conclusions of fact or of law, instead of positively alleging material facts** (Emphasis ours).

Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152.
United States v. Ray (D. C.), 275 F. 1004-1006.
Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338.
Boyd v. United States, 116 U. S. 624-630, 6 S. Ct. 524, 29 L. Ed. 746.

"To hold otherwise would reduce search warrants to the status of the old writs of assistance, and would fritter away the rights guaranteed by the Fourth Amendment, thereby giving free rein to abuses, hateful to a form of government which is intolerant of the arbitrary and irresponsible exercise of power.

"We must hold, therefore, that affidavits or depositions which simply state that the affiant or deponent **has reason to believe and does believe** that a crime

has been or is in course of being committed, or which go no further than to allege conclusions of law or of fact, **or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid.**" (Emphasis ours).

CONCLUSION.

In the last analysis, it is the **statement of the particular grounds or probable cause for its issue, set forth and incorporated** in the **search warrant itself,** that **determines** or **tests the validity or invalidity of the search warrant,** and **no ex parte affidavit can be invoked to bolster up any infirmity contained therein,** by reason of the **mandatory provisions of Section 6 of the Espionage Act,** (supra). It is, therefore, contended that the **search warrant was invalid,** and the Government is estopped by its own admission, (Government's Brief, pp. 13-14), from urging further contention upon this Honorable Court, against the granting of the Writ.

Respectfully submitted,

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